SUPREME COURT, U.S.
FILED
APR 25 1991
OFFICE OF THE CLERK

90-1644

No. _____

In The

Supreme Court of the United States

October Term, 1990

THOMAS E. WHEELER, JR.,

Petitioner,

v.

VALERIE R. WHEELER,

Respondent.

Petition For A Writ Of Certiorari To The Alabama Court Of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

WILBURN DONALD BOLTON, JR.
Post Office Box 259
307 South McKenzie St.
Foley, AL 36536
(205) 943-3860
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Will fathers of young children in the State of Alabama, such as the Petitioner, continue to be denied due process of law in custody cases by the *de facto* application of the maternal preference presumption known as the "tender years doctrine", when such presumption has been found to be an impermissible gender based bias violative of the equal protection clause of the Fourteenth Amendment of the Constitution?

RULE 28.1 LIST

The caption of the case in this court contains the names of all parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AMENDMENT INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 11

The Alabama appellate courts' refusal to recognize and remedy a substantial and long standing *de facto* violation of the equal protection clause of the Federal Constitution brings the decision below in conflict with the applicable decisions of this Court

CONCLUSION 28

APPENDIX 1a

Wheeler v. Wheeler, 574 So.2d 832 (Ala.Civ.App. 1990) 1a

Santilli and Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine*, 14 Law and Behavior 123 (1990) 1b

TABLE OF AUTHORITIES

Page

CASES

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 19, 24, 25

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954) 29

Caban v. Mohammed, 441 U.S. 380 (1979) ..... *passim*

Castaneda v. Partida, 430 U.S. 482 (1977) 19, 22

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 20

Devine v. Devine, 398 So.2d 685 (Ala.Civ.App. 1980) 11, 13, 19

Ex parte Devine, 398 So.2d 686 (Ala. 1981) ..... *passim*

Fronterio v. Richardson, 411 U.S. 677 (1973) 14, 26

Hanson v. Hanson, 467 So.2d 961 (Ala.Civ.App. 1985) 12

Hazelwood School District v. United States, 429 U.S. 299 (1977) 22

Hood v. Wilson, 496 So.2d 76 (Ala.Civ.App. 1986) .10, 16

Hovator v. Hovator, (Ms.Civ. 7618, August 29, 1990) ___ So.2d ___ (Ala.Civ.App. 1990) 23

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 19

Orr v. Orr, 440 U.S. 268 (1979) ..... *passim*

Pacific Mutual Life Insurance Company v. Haslip, 59 U.S.L.W. 4157 28

Powers v. Ohio, 59 U.S.L.W. 4268 (1991) 24, 27, 29

TABLE OF AUTHORITIES – Continued

Page

Reed v. Reed, 402 U.S. 71 (1971) 14, 17, 26

Stanley v. Illinois, 405 U.S. 645 (1972) 15, 17

Washington v. Davis, 426 U.S. 229 (1976) 18, 19

Wheeler v. Wheeler, 574 So.2d 832 (Ala.Civ.App. 1990) 7, 9, 10, 16, 23

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Art. XIV, Section 1 ..... 1, 10, 11

28 U.S.C. Section 1257(3) 1

MISCELLANEOUS

Roth, *The Tender Years Presumption Child Custody Disputes*, 15 J.Fam.L. 423 (1976) 15

Santilli and Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine*, 14 Law and Behavior 123 (1990) 10, 11, 13, 15, 20, 21, 22

Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure:* Jurisdiction § 4033 27

The Petitioner, THOMAS E. WHEELER, JR., respectfully prays that a writ of certiorari issued to review the judgment and opinion of the Alabama Court of Civil Appeals, entered in the above titled proceeding on September 12, 1990.

OPINIONS BELOW

The opinion of the Alabama Court of Civil Appeals is reported at 574 So.2d 832 and is reprinted in the appendix hereto, page 1a, infra.

The Supreme Court of Alabama denied the Petitioner's Petition for Writ of Certiorari and issued its Certificate of Judgment by Order dated January 25, 1991.

JURISDICTION

The judgment of the Alabama Court of Civil Appeals was entered on September 12, 1990, affirming the Respondent's award of the custody of the parties' three children which was contained in a judgment of divorce which was entered in the Circuit Court of Baldwin County, Alabama, on December 12, 1989. An application for rehearing was filed on September 26, 1990, and overruled on October 24, 1990. Thereafter, on January 25, 1991, the Supreme Court of Alabama denied a Petition for Writ of Certiorari to the Alabama Court of Civil Appeals. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AMENDMENT INVOLVED

Section 1, Article XIV of the Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Tom Wheeler, is the father of three children who are of "tender years" (i.e., less than seven years of age). He has been a practicing attorney in Pensacola, Florida, since 1977. In June, 1983, he was introduced to the Respondent, Valerie Wheeler, on a "blind date". At that time, the Respondent had just completed her second year of medical school. Approximately two weeks later, the Respondent herself proposed and several months later the parties were married at Mr. Wheeler's home in Gulf Breeze, a suburb of Pensacola, Florida.

At the at time of the marriage, Valerie Wheeler was 25 years of age. She stated it was her express desire to have three children by the time she was 30. Tom Wheeler did not oppose this. The parties further agreed that the children would be raised in the Pensacola area. This is where both Valerie Wheeler's mother and stepfather and family reside, and where Tom Wheeler's parents and most of his immediate family reside.

Also at the time of the marriage, Valerie Wheeler was faced with a severe debt situation arising from her mounting college and medical school loans.

On July 10, 1984, approximately nine months after the marriage, the parties' first child, daughter Casey was born. She was described as a "daddy's girl". In the fall of 1984, Tom Wheeler moved his family from Florida to Daphne, Alabama, which is a suburb of Mobile. This move was to facilitate Valerie Wheeler's finishing her

medical school education at the University of South Alabama (USA) School of Medicine in Mobile. Tom Wheeler continued to commute to his practice in Pensacola. In July, 1985, Valerie Wheeler began a five year residency training program in the specialty of pathology at USA in Mobile. Soon thereafter, the parties' oldest son, Thomas, III, was born on February 26, 1986. Subsequent to the birth of Tommy, Valerie Wheeler hired a day-time nanny to care for the children and to perform her home chores and to cook.

Beside the obligatory call schedule and rigorous work requirements of her residency training, Valerie Wheeler published numerous articles and reports beginning in her first year of the residency and continuing throughout the residency until shortly before the separation.

Ultimately, because of her numerous publications and extensive efforts in the residency program, Valerie Wheeler was described as a "good to excellent" resident by the head of her residency program. He appointed her administrative chief resident during her fifth and final year of residency.

In the summer of 1986, Valerie Wheeler brought an additional child into the home, her five year old niece, Nancy. Shortly thereafter, Valerie Wheeler became pregnant with the parties' third child, Brennan. This immediately became a difficult and trying pregnancy. Valerie Wheeler was so physically limited she could not fulfill her responsibilities as a resident and the head of the residency program required her to take a leave of absence over her protest.

During this difficult last pregnancy, in 1986 and 1987, there were three children in the home for Mr. Wheeler's care: Nancy, age 5; Casey, age 2; and Tommy, the newborn. There was no live-in nanny or close family support

to assist him in the daily care of the children. During this time, even Valerie Wheeler testified that Tom Wheeler cared for the children in the evenings from the time he got home until he put them to bed, told them stories at bedtime, and taught the children their evening prayers.

Additionally, Valerie Wheeler described Tom Wheeler as a "great playmate" for the children. On appeal, Valerie Wheeler conceded "Tom Wheeler could care for the needs of the children in a recreational setting, or that he was a great playmate with the children was not contested by Valerie Wheeler".

With all this going on and not even halfway through her residency training, Valerie Wheeler began insisting on doing specialty training at another institution, perhaps Johns Hopkins. She was indignant that Tom Wheeler would not permit her, the children and the nanny to move off and leave him behind for a year or that he would not follow her and give up his job, the primary support of the family.

Subsequently, she decided to do a year of training at another institution by herself and "told everybody" that the children were going to stay with their father in the family home and she would commute home on the week-ends as she was able. In March, 1988, she in fact applied and interviewed to do the fifth year of her residency at the University of Alabama at Birmingham which was approximately 250 miles away. This would have been effective July, 1989.

Brennan Andrew Wheeler was born June 3, 1987. In the fall of 1987, Valerie Wheeler returned to the residency program from her forced leave of absence and maternity leave. The following summer (1988) she announced the end of the marriage.

She precipiated the immediate divorce action by removing the children from the home of the parties on

November 23, 1988, the evening before Thanksgiving. She was on call that evening and arrived home late. As usual, Mr. Wheeler had the care of the children. He then informed her that he would not sign her agreement giving her custody. She then removed the children from the home. For eight days she hid them. She called home and informed Mr. Wheeler that he would never see the children again if he did not sign her document.

At all hearings and at the trial on the merits, Tom Wheeler presented evidence that he had an extremely close bond with his children, that he was actively involved with the daily caring of the children, that he modified his work schedule to be available for the needs of the children and the training schedule of his wife, that he was committed to the daily raising of the children and that he had always been the "nurturing parent". It was undisputed that it was he who usually got up in the middle of the night when the children needed attention.

Valerie Wheeler was asked about her qualifications for custody, and she replied "I'm the mother . . . and Tom can't care for the children". The only examples she could give as to the latter point were complaints of Tom's care after her filing the divorce. She produced no witnesses to substantiate these complaints. Her witnesses at trial consisted primarily of only a few members of her family and the nanny.

Tom Wheeler, on the other hand, presented a comprehensive case for custody, including testimony of the parties' treating psychologist, the parties' next door neighbor, his best friend, the wife of his associate, his senior law partner, his former legal secretary, both of his sisters, and his parents. Each of these witnesses confirmed that Tom Wheeler was capable of totally caring for the daily needs of the children and that he, in fact, did so. Tom Wheeler was shown to have "tremendous rapport

with the children", he had modified his work schedule to be supportive and contribute to the needs of his family, and that all of this was done "quite cheerfully and happily".

The witnesses not only showed Tom Wheeler's care of the children prior to the separation, but also Valerie Wheeler's absence from their care. For example, their next door neighbor testified that for the two years before separation (1987 and 1988) the Wheeler children spent their time at home with their father. He disciplined them and they listened to him very well. Valerie Wheeler was never seen. Also, the wife of Tom Wheeler's law associate, a professional woman herself, noted that she and her husband tried during the year of 1988 to develop a relationship with the Wheelers, but were frustrated because "Valerie was working most weekends". She then noted that she had several occasions to observe Tom Wheeler care for his children and he "was obviously very able to care for the children on his own". Valerie Wheeler, on the other hand, was unable to produce a single non-family witness to substantiate her care of the children pre-separation under any circumstances.

Another of Tom Wheeler's witnesses was Dr. Ron Yarbrough, a clinical psychologist. He was the only expert witness to testify during these proceedings. He testified that he met with both Tom and Valerie Wheeler, administered the Minnesota Multiphasic Personality Inventory (MMPI) test to both of them, and met with them during a period of seven months, both before and after the separation. He testified that Tom Wheeler had positive child-rearing attributes (nurturing, trustworthy, conciliatory, and more likely to facilitate visitation).

On the other hand, Dr. Yarbrough testified Valerie Wheeler has difficulty accepting fault, has difficulty with criticism, sees herself in an overly idealized manner, and finally stated his opinion that Valerie Wheeler was more

interested in "winning" than in acting in the best interest of the children. The trial judge then asked Dr. Yarbrough several questions clearly intended to rehabilitate Valerie Wheeler's case. In particular, he asked if it was "possible" (not probable) that Valerie Wheeler could begin acting in the best interest of the children at some time in the future.

Dr. Yarbrough also testified that the children should be raised in Pensacola where all family support groups resided. He strongly emphasized the positive benefits of these groups to the children in a post-divorce setting. This is consistent with Valerie Wheeler's acknowledgement that a pre-condition of the marriage was her promise to raise the children there and that all family support groups resided in that area. Yet even during the residency, as noted above, Valerie Wheeler was making plans to leave the area. Post-separation, she told Tom Wheeler's mother of her plans to leave the area and that she would send Mr. Wheeler "a plane ticket" for his visitation.

Perhaps the most compelling evidence of the true nature of the litigants and their respective cases is that Valerie Wheeler's testimony was one of continually impeached fabrications. Although these serious misrepresentations by Valerie Wheeler were fully presented at trial and several were presented in the initial Appellant's brief below, she never attempted to explain or justify these misrepresentations. Even the Alabama Court of Civil Appeals found that Valerie Wheeler's testimony had indeed been "contradicted" (574 So.2d at 834).

For example, Valerie Wheeler was repeatedly asked at the February, 1989, temporary hearing to explain her long distance telephone expenses of $200 per month. She insisted that these charges were her calls from work to her home, a distance of about thirty miles, to talk to her children. When cross-examined from the actual itemized statements at the June, 1989, final hearing, she then

admitted that the calls were made to a male plastic surgeon "friend". These itemized long distance statements document heavy telephone traffic with this young surgeon, beginning over three months prior to the separation of the parties and continuing another two months post-separation, until just a few weeks before the February, 1989, temporary hearing.

Valerie Wheeler then explained that this young surgeon was a crack cocaine addict whom she was "counseling". During this sensitive examination, she stated that she failed to properly report the true facts concerning her "friend" to the head of the USA Department of Surgery for fear "it would ruin his career". This is in spite of medical ethics and an Alabama statute which would require specific disclosure.

Valerie Wheeler, the physician, also misrepresented the specific medical findings of the parties' psychologist, Dr. Yarbrough. At the first temporary hearing of November 29, 1988, when Dr. Yarbrough was not present to testify, Valerie Wheeler indicated that the clinical test results of the MMPI test showed that Tom Wheeler was "over the danger zone in the anger scale". She also reported to Tom Wheeler's father that Dr. Yarbrough had found his son to be "dangerous". Yet when Dr. Yarbrough testified at the final hearing in June, 1989, he specifically denied even suggesting to anyone that Tom Wheeler was dangerous or "over the danger zone in the anger scale".

Even as to financial matters, Valerie Wheeler's continuous and often senseless misrepresentations were exposed. For example, she volunteered that, until the divorce proceedings began, she did not know that Tom Wheeler's parents had bought the parties' home in Gulf Breeze, Florida, even though this sale generated a $23,000 profit which was used solely to pay off her medical school student loans. But then the actual deed bearing her

notarized signature was introduced showing the transfer to Tom Wheeler's parents.

The final hearing took four days of presentation. Mr. Wheeler presented the majority of his case on June 12 and 13, 1989, and due to the Court docket, Mrs. Wheeler concluded her testimony on September 12, 1989. The Court then took the matter under advisement for 93 days and a Final Judgment of Divorce was entered on December 12, 1989, awarding custody of the minor children to Valerie Wheeler. The trial court gave no explanation or justification of this award.

Tom Wheeler filed a Notice of Appeal to the Alabama Court of Civil Appeals on January 17, 1990. The Court affirmed the judgment of the trial court on September 12, 1990. An application for rehearing was timely filed on September 26, 1990, and overruled on October 24, 1990. A timely filed Petition for Writ of Certiorari was filed with the Alabama Supreme Court and it was denied by Order dated January 25, 1991.

As noted above, the Court of Civil Appeals' opinion acknowledged the contradiction of Valerie Wheeler's testimony but refused to review its significance, deferring that matter to the trial court. It stated its deference to the trial court as follows:

> Because the evidence conflicted, it is well within the *prerogative of the trial court* to determine what custody arrangement was in the best interest of the minor children (574 So.2d at 833). (emphasis added)

The court acknowledged that it would not compare the relative merits of the evidence and would provide no real review of the custody award when, at 574 So.2d 833, it stated:

> We find that there is ample evidence that both parties are fit persons to be awarded custody.

> We have stated heretofore that in such a case, *"the trial court would not have been in error regardless of whom was awarded custody of the children"*. *Hood v. Wilson*, 496 So.2d 76, 77 (Ala.Civ.App. 1986). (emphasis added)

The opinion acknowledged that the father had raised the *"de facto* application of the now abolished tender years doctrine" (574 So.2d 832). The father presented to the Court of Civil Appeals the recent publication from the University of Alabama to establish the statistical disparity in custody awards between fathers and mothers in contested cases in the State of Alabama. At page 1b in the appendix attached hereto is the April, 1990, publication, *Law and Human Behavior*, Volume XIV, No. 2, 1990, which published the research and analysis of Laura E. Santilli and Michael C. Roberts, entitled "Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine" (hereinafter Santilli and Roberts). The difficulties of obtaining the results of actual contested cases in Alabama are highlighted in the article. The court system of Alabama does not maintain statistics pertinent to the results of contested cases nor does the National Center for State Courts in Williamsburg, Virginia.

The Alabama Supreme Court in 1981, in analyzing a series of cases in the 1970s from this Court, culminating in *Orr v. Orr*, 440 U.S. 268 (1979), and *Caban v. Mohammed*, 441 U.S. 380 (1979), had found the long entrenched maternal preference rule, also known as the "tender years doctrine", to be violative of the Federal Constitution's Fourteenth Amendment's Equal Protection Clause, *Ex parte Devine*, 398 So.2d 686 (Ala. 1981). However, that case did not establish any remedies which would discourage the continuation of a *de facto* application of this presumption.

REASON FOR GRANTING THE WRIT

The Alabama appellate courts' refusal to recognize and remedy a substantial and long standing de facto violation of the equal protection clause of the Federal Constitution brings the decision below in conflict with the applicable decisions of this Court.

In divorce cases in the State of Alabama, the father continues to be awarded custody of the parties' children in only one out of every ten contested cases. This statistic is from the above referenced article by Santilli and Roberts (attached at page 1b to the appendix hereto). This article only confirms a fact which every competent lawyer in Alabama knows well.

The conclusions and observations of the research are still shocking. The appellate courts of Alabama refuse to recognize invidious gender based *de facto* discrimination. This is despite the fact that the Alabama Supreme Court in 1981, found that the long entrenched maternal preference rule, also known as the "tender years doctrine", to be violative of the Federal Constitution's Fourteenth Amendment's Equal Protection Clause, *Ex parte Devine*, 398 So.2d 686 (Ala. 1981).

The "tender years" doctrine allows that a mother has a prima facia right to custody unless she is shown to be clearly or peculiarly unfit. For instance, the year after *Orr v. Orr* and *Caban v. Mohammed, supra*, the Alabama Civil Court of Appeals, the appellate court of general jurisdiction in the state, in *Devine v. Devine*, 398 So.2d 685 (Ala.Civ.App. 1980), would still declare:

> Though stated in different ways, the "tender years" doctrine is: where a child is of such tender age as to require the care and attention that a mother is specially fitted to bestow upon it, *the*

> *mother, rather than the father, is presumed to be the proper custodian, unless for some reason she is unfit for the trust.* (emphasis added)

Tender years is typically defined as children under the age of seven. At the time of the entry of the decree (December 12, 1989) all three Wheeler children were of tender years.

In 1981, the Alabama Supreme Court knew the continued blatant use of this prejudice would not pass constitutional muster in this Court. In 1979, in *Caban*, this Court had sounded the death knell of the tender years doctrine when it declared:

> Maternal and paternal roles are not invariably different (411 U.S. 389).

The handwriting was on the wall. There was no rational or scientific basis for this presumption. Further, the Alabama Court was aware that in *Orr v. Orr*, this Court had only recently reviewed another sexually biased domestic practice of the state of Alabama, the Alabama alimony statute which afforded women, but not men, a right to alimony, and had declared that statute to be violative of the equal protection clause[1]. The Alabama

---

[1] It is arguable that the constitutional violations found in *Orr v. Orr* also live on in Alabama and in particular in this case *de facto*. The trial court refused to allow Mr. Wheeler to fully enumerate his financial contributions to his wife in paying off her extensive medical school loans. If this had been a wife making these contributions to her husband's professional career, she would have been allowed to present this evidence in furtherance of an award of alimony or repayment of these funds with interest. See e.g. *Hanson v. Hanson*, 467 So.2d 961

(Continued on following page)

court headed off an immediate review by this Court of Alabama's tender years presumption by its *Ex parte Devine* decision. However, the glaring deficiency of *Ex parte Devine* is its failure to implement an adequate remedy to ensure fathers their rights to fully and fairly participate in custody determinations. This has allowed the practice to continue. This lack of an adequate appellate remedy to discourage this "administratively easy" presumption from silently (i.e. *de facto*) recurring only postponed the inevitable. Its recent refusal to even consider the above University of Alabama statistics only confirms the Alabama courts' real insensitivity to gender based constitutional issues as previously demonstrated in *Orr v. Orr*.

In Alabama, it is clear from the Santilli and Roberts study (see in particular Table 2, at page 130 (p. 17b of appendix), discussed below) that fathers prior to 1981 had little or no chance (a one in ten chance, per Table 2, hereinafter denoted as "9:1") of obtaining custody in a contested proceeding. These statistics should not have been surprising in light of the clear legal philosophy noted above from *Devine v. Devine* espousing the *de jure*

(Continued from previous page)

(Ala.Civ.App. 1985). The evidence that was permitted did show that the Gulf Breeze home which Mr. Wheeler brought into the marriage was sold and the $23,000 profit was used to pay off medical school loans for Mrs. Wheeler.

There can be no question that this direct question was not presented to the lower appellate courts. Obviously the monumental task of addressing the constitutional violations concerning Mr. Wheeler's rights to child custody has been the crucial issue presented. However, in reversing custody after a strict scrutiny review of this record, it would be appropriate for this Court to remand this portion of the case for consideration of an award of compensation for this contribution in light of Valerie Wheeler's current enormous earning capacity as a medical specialist.

applicability of the tender years doctrine which had been in place for generations in that state.

In *Ex parte Devine*, the Alabama Supreme Court analyzed the tender years doctrine in light of the more modern interpretations of the equal protection clause as it applies to gender biased cases. These cases included *Reed v. Reed*, 402 U.S. 71 (1971), *Frontierio v. Richardson*, 411 U.S. 677 (1973), *Orr v. Orr*, 440 U.S. 268 (1979), and *Caban v. Mohammed*, 441 U.S. 380 (1979).

The court acknowledged that fathers of tender years children are members of historical sexual classifications which were inherently suspect and therefore entitled to close judicial scrutiny (398 So.2d at 693).

It then concluded at pages 695-696 as follows:

> Having reviewed the historical development of the presumption as well as the modern status, and having examined the presumption in view of the holdings in *Reed*, *Frontierio*, *Orr* and *Caban*, we conclude that the tender years presumption represents an unconstitutional gender based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex. Like the statutory presumption in *Reed*, the tender years doctrine creates a presumption of fitness and suitability of one parent without any consideration of the actual capabilities of the parties. The tender years presumption, like the statutory schemes in *Frontierio* and *Orr*, imposes legal burdens upon individuals according to the "immutable characteristic" of sex. By requiring fathers to carry the difficult burden of affirmatively proving the unfitness of the mother, the presumption may have the effect of depriving some loving fathers of the custody of their children, while enabling some alienated mothers to arbitrarily obtain temporary custody . . . We are convinced that the tender years presumption

> rejects the fundamental proposition asserted in *Caban* that *"maternal and paternal roles are not invariably different in importance." Caban, supra,* at 441 U.S. 389. (emphasis added)

With some insight, the court noted, at page 696:

> Courts have come to rely upon the presumption as a substitute for a searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children. The presumption has thus become what one writer refers to as an "anodyne" for the difficult decisions confronting the court. Roth, The Tender Years Presumption in Child Custody Desputes, 15 J.Fam.L. 423, 438 (1976) . . . However, as Justice White correctly observed in *Stanley v. Illinois,* 405 U.S. 645, 92 S.C. 1208, 31 L.Ed.2d 551 (1972), "(P)rocedure by presumption is always cheaper and easier than individualized determination." In view of the fact that the welfare of children and competing claims of parents are at stake, such a means of determination cannot be justified.

The court then reversed the explicit use of the tender years doctrine by the trial court and remanded it with directions that the trial court instead consider the individual facts of the case. The court then highlighted a series of some sixteen factors to be used in this new individualized analysis which was replacing the tender years presumption. However, the court did not require any specific findings of fact by the trial court and has not required strict scrutiny of the record by the appellate courts of Alabama. In fact, as noted above, there is now an almost total deference by the appellate courts of the State of Alabama to the trial judges despite this strong, entrenched history of the use of the tender years doctrine and the undenied statistics on this matter.

Returning to the Santilli and Roberts article, it found that since *Ex parte Devine* the statistics of fathers (1) receiving custody (9:1 against the father) and (2) even

requesting custody have not changed one iota from the statistics obtained from cases before *Ex parte Devine*! The study demonstrates that the previously sanctioned *de jure* philosophy of the tender years doctrine, so clearly outlawed by *Ex parte Devine*, still controls the disposition of almost all custody disputes in Alabama. Over the ten year span of the statistical review, this grossly disproportionate ratio of 9:1 could not have been the result of accident or chance. Apparently the only lesson truly learned by the trial courts of the State of Alabama is that the tender years doctrine is simply not to be mentioned in the record or in the final judgment as it was in *Ex parte Devine*. The statistics, however, reveal that in fact the presumption continues to be applied unabated.

What is additionally discouraging is that the appellate courts of the State have done the very opposite of what is needed to remedy traditional constitutional violation cases. Instead of strict scrutiny of the record, it has refused to adopt any type of review of the custody record! In this case in particular, the Court notes that Valerie Wheeler was impeached when it indicates that her testimony was "contradicted". Nevertheless, the Court completely defers to the trial court when it states after that observation that:

> Because the evidence conflicted, it is well within the prerogative of the trial court to determine what custody arrangement was in the best interest of the minor children. 574 So.2d at 833.

Thus, the appellate court is not going to review the fact that the testimony of the mother was both incredulous and untrustworthy. That was not going to be a concern of the appellate court.

But the Court does not stop there. It then went on to state, 574 So.2d at 833, that where there is evidence that both parties are fit persons to be awarded custody, "the trial court would not have been in error *regardless* of whom was awarded custody of the children". Citing *Hood*

v. Wilson, 496 So.2d 76, 77 (Ala.Civ. App. 1986). Thus, as soon as Valerie Wheeler took the stand and stated her prima facia case for custody, that "I'm the mother and I am fit", the Petitioner/father was absolutely without appellate recourse to have his substantial case for custody reviewed unless he proposed to show the absolute unfitness of the mother. This lack of review confirms that as long as an Alabama mother is "not unfit", i.e., as long as she is minimally fit, she will obtain custody no matter how much "fitter" the father may be.

Caban's basic constitutional premise that the roles of mother and father are not invariably different requires and expects that contested custody cases should result in a 50/50 (i.e., 1:1) split of decisions between mothers and fathers. A contrary 9:1 ratio should immediately trigger a recognition of potential constitutional violation and a strict review of such cases. It appears that the Alabama appellate courts have fallen into their own trap of administrative ease condemned by this Court in *Stanley, Reed* and *Caban, supra*.

There is always a strong desire by an appellate court to give deference to the judgment of the trier of fact. But where a trier of fact is the source of a constitutional violation it does not deserve or warrant such a blind deference.

This is especially true where the constitutional violation is a judicial presumption. The operation of this presumption requires only that a party be identified as the mother. The mother does not have to put on any real evidence after that point. Actually, as is evident in the record, below she is then free to repeatedly perjure herself or to simply fill the record with incredulous, self-serving testimony. Evidence of fitness as to either party does not matter.

This case is a classic example. Valerie Wheeler was so impeached, her testimony of supposedly carrying, delivering and raising three children during a medical residency by herself was so incredulous, that even the non-reviewing appellate court had to find that her testimony was "contradicted". But if one party (the father) presents a competent and substantial case for custody (and was found fit) and is "uncontradicted", how did the mother prevail when her case was "contradicted"?

Valerie Wheeler was basically only able to present her nanny and a few family members in support of her case. She presented no expert testimony. Unlike Tom Wheeler, no neighbor, no family friend, no colleague, no sibling testified for her. For the five years prior to the separation, the only unimpeached testimony that Valerie Wheeler could present was that she "carried each child during pregnancy" and that she "breast fed" the children. She simply presented those two facts over and over. In one series of questions by Valerie Wheeler's attorney, fourteen of twenty consecutive questions used the term "breast fed" when questioning her about her care of the children. She presented only the most fundamental case possible: "I'm the mother". But the reason for this type presentation by Valerie Wheeler is as simple as it is obvious: she was fully confident of the operation of the tender years doctrine in her case.

In light of this history and of the blatantly discriminatory purposes of the tender years doctrine, the controlling legal principals in this case to establish a *de facto* equal protection violation are relatively clear. The central purpose of the Fourteenth Amendment's equal protection clause is, of course, the prevention of official conduct discriminating on the basis of race, (or other suspect classification such as gender). *Washington v. Davis*, 426 U.S. 229, 239 (1976).

As in race cases, it is incumbent upon the appellant to establish that a racially (or in this case sexually) disproportionate impact was occasioned by a racially (sexually) motivated purpose. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Washington v. Davis, supra,* at 239.

An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that the challenged conduct bears more heavily upon one race (or one sex) than another. *Washington v. Davis, supra,* at 242. The determination ultimately required demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, including the impact of the challenged action, its historical background, and its official history. *Arlington Heights v. Metropolitan Housing Corp., supra,* at 266-268.

This Court has made it "unmistakably clear that 'statistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue". *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977). "Statistics showing racial or ethnic (or in this case sexual) imbalance are probative . . . because *such imbalance is often a telltale sign of purposeful discrimination*". *Id.* n.20 431 U.S. at 339, see *Castaneda v. Partida,* 430 U.S. 482 (1977).

Thus in initiating this "sensitive inquiry" of discriminatory purpose we first recall the previous discussion of the purpose, background and history of the tender years doctrine. It must be acknowledged that this intentionally discriminatory practice is deeply ingrained in Alabama jurisprudence. It is ludicrous to deny this point when the Alabama Court of Civil Appeal described in *Devine v. Devine,* 398 So.2d 684, 685 (Ala.Civ.App. 1980), the purpose and justification of the presumption in such glowing terms as follows:

> We consider that the "tender years" presumption has never been one of law but rather one of

> fact subject to rebuttal by evidence of misconduct or unfitness of the mother. *Hammac, supra.* It is not a classification based upon gender, *but merely a factual presumption based upon the historic role of the mother in maintaining and keeping the home, and succoring and caring for the children.* Its basis probably goes deeper and lies in the biological and thus primeval instinctual role of a mother. It is nature's way of propagation. *It is observable that a child reciprocates and flourishes in response to the mother's role.* If this be a gender classification, it was not made by the state. It is no more than fact recognized by the courts of this state after more than 150 years of experience (emphasis added).

The fact that the Alabama Supreme Court, in reversing the very decision containing the above prose in *Ex parte Devine,* failed to establish any remedy to eradicate the efforts of the pervasive tender years presumption is prima facie proof today of the forbidden purpose. An inference from statistical proof to establish the necessary intent or purpose is not really required in this case.

This follows from this Court's holding in *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979). In that case, this Court found that there is an affirmative duty to eradicate the effects of historical discrimination. The failure to exercise such a duty will be prima facie proof that currently existing discrimination was caused at least in part by prior intentionally discriminatory official acts.

The next step of inquiry is to review the Santilli and Roberts research in detail. This article is not some sort of abstract analysis. It is a scientific examination of real court decisions investigating whether or not the tender years doctrine is in full force and effect in Alabama. The Santilli and Roberts article starts with the observation (at page 124, p. 3b of appendix hereto):

> In 1977, the counsel of representatives of the American Psychological Association stated that

> the presumption against fathers in child custody cases *did not have a scientific or psychological basis* (Levy, 1985).

This statement is consistent with the literature listed in foot note #1 in *Ex parte Devine, supra.*

Over three hundred cases from Tuscaloosa County, Alabama, were studied from a time period of 1976 through 1980, and 1982 through 1986. The *Ex parte Devine* decision was to serve as a marker of change affecting the family courts in Alabama.

Tuscaloosa County was chosen in the first instance because it comprised the population that is comparable to the State of Alabama as a whole along many potentially relevant dimensions (U.S. Department of Commerce and Bureau of Census, 1982). These dimensions included per capita income, percent of the population who have ever been divorced, ratios of blacks to whites, and percent of the population living in urban areas (page 127, p. 12b of appendix). Tuscaloosa County was chosen as a reasonable "sample" of the state.

The authors described their study to be "an empirical data analysis of specific outcome measures to ascertain the impact of legal precedent". At page 130 (p. 17b of appendix), table 2, in *contested* cases it is shown that the fathers were only granted custody 10.5% of the time. During the period of the study, there was no change from the five year period before *Ex parte Devine* and the five year period afterwards. The study concludes, at page 133 (p. 23b of appendix), that "therefore, no significant impact from the *Ex parte Devine* decision could be discerned from this data".

It should also be noted that in a review of the files, there were only three references which were made to the child's tender age and those were all before 1981 (page 133, p. 24b of appendix). Thus, although the vast majority of cases were decided without specific reference to the

tender years doctrine, the final decisions were all consistent with the application of that doctrine.

Especially noteworthy to the authors in their discussion at page 134 (p. 25b of appendix) was the finding "that requests by fathers have not increased, however, lends itself to a stronger statement on the lack of change". The lawyers of this state are telling their father clients: there is little hope of custody in an Alabama court unless there can be proof of "absolute unfitness on the part of the mother".

In light of the clear historical discriminatory intent of the tender years doctrine, the statistics as contained in Table 2 of the Santilli and Roberts study are sufficient to establish that fathers of tender years children are continuing to be victims of the same constitutional violation acknowledged in *Ex parte Devine*. It would appear that any additional statistical analysis contained in this court's cases of *Castaneda v. Partida, supra,* and *Hazelwood School District v United States,* 429 U.S. 299 (1977), would establish the results of at least three or more standard deviations from the expected 1:1 ratio consistent with *Caban*.

Although this court has not in terms established a two standard deviation "floor" for statistical significance, *Castaneda* and *Hazelwood* certainly imply that a confident showing of statistical significance begins to arise at that level. These statistics exceed such a floor. Of course, neither *Castaneda* and *Hazelwood* dealt with an admitted historical practice of discrimination as acknowledged by the Alabama judiciary in *Ex parte Devine, supra.*

Furthermore, this analysis and conclusion is only buttressed by even a brief review of the record below, much less by strict scrutiny. Why did the trial court ask Dr. Yarbrough questions obviously biased in Valerie Wheeler's favor? Among several such questions why did the trial court improperly inquire if it was *possible* for Valerie Wheeler to begin acting in the best interest of the

children in the future? Why not award the children to the father who was fit and was clearly acting in the best interest of the children *now*?

How could the trial court turn its back on Valerie Wheeler's continuous perjuries and misrepresentations? Was not Valerie Wheeler's credibility an issue in this proceeding? If both parents are supposedly fit (the only actual finding in the Court of Civil Appeals opinion below, 574 So.2d at 833), how could the court award custody to the party whose testimony was "contradicted"? Further, one of the sixteen factors of *Ex parte Devine* supposedly applied in this case calls for an evaluation of the parties' "character".

How could a court award custody to the mother (when the father is fit) when she abused her own children (to say nothing of her husband) by taking them from their home for eight days and letting them cry over the phone in an attempt to coerce the father's execution of her settlement agreement? What right does a mother have to abuse her family? How can any such parent ever be fit to have custody?

How could a court award custody to the mother when it was plain that she intended to move far from the parties' established home forever separating the children from their father and family support groups? Considerable, uncontradicted psychological expert testimony was presented on this very point, yet it is disregarded. In fact, a recent Alabama opinion clearly recognizes the need for support groups. *Hovator v. Hovator*, (Ms. Civ. 7618, August 29, 1990) ___ So.2d ___ (Ala.Civ.App. 1990). But note the continuing sexist context of this point, at page 11 of the opinion.

> In this day of the single, working *mother*, we deem familial support to be important. (emphasis added)

The Alabama court just cannot bring itself to acknowledge even the existence of a "single, working father"

having custody and thus needing familial support. Let Valerie Wheeler pursue her career wherever it may take her, Johns Hopkins or otherwise. But leave the children to the care of the fit father and family support groups in Pensacola.

The list goes on and on. If both parties are fit, how could a court award custody to the mother who blatantly violates her professional oath as a physician by failing to properly report the cocaine addiction of her male surgeon "friend"? Did she not feel any compunction to protect the patients of USA Medical Center? Is this total lack of ethical concern really what we wish to impart to our children?

This disregard of the record below only confirms the obvious use of the tender years doctrine in the case at bar. The judgment cannot be justified by the record.

The above analysis and conclusion, based in part on the statistical study as a fair representative sample of the state, clearly establishes the Petitioner as a member of the suspect classification statewide which is entitled to the constitutional remedy of strict scrutiny. But in light of Petitioner's significant injury-in-fact, any fair interpretation of this Court's other broad rules of standing in constitutional "underinclusion" cases would be fairly met also. See e.g., *Orr v. Orr, supra.*

The Alabama Court of Civil Appeals' reply to this overwhelming evidence of constitutional impropriety is both disturbing and saddening. Proof as here that the challenged conduct was motivated even *in part* by a discriminatory purpose shifts to the defendant the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. at 270-71, n. 21.

Most recently this Court in *Powers v. Ohio*, 59 U.S. L.W. 4268 (1991) found that white defendants are entitled

to new trials if convicted by juries from which blacks were excluded because of their race. This Court found that if most preemptory challenges are used against people of one race, the prosecutor must prove the exclusions were not racially motivated.

Similarly in this case, where most custody awards are against people of one sex, the respondent must prove the awards were not sexually motivated.

But no Alabama court in this case even suggested it had tried to meet this burden. The trial court gave no reason for its award of custody. The appellate court plainly deferred to the trial court.

Instead, the Defendant/Respondent incredulously suggested to the court that a simple question of the trial court would avoid this burden. The Alabama Court of Civil Appeals (at 574 So.2d at 833) adopted this suggestion and stated:

> Finally, regarding the husband's contention that the trial court reached its decision based on improper concerns, especially the tender years doctrine, we note that, while questioning an expert witness, the trial court stated, "Simply because the initial bond exists *does not necessarily in all cases* make the mother the better parent, does it?" We find this statement to be indicative of the trial court's recognition that an award of custody based *solely* on the tender years of the children is improper (emphasis added).

To use this quote as some sort of substitute for a detailed review of the record to meet the "burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered" is incomprehensible. It only further demonstrates a total lack of appreciation of constitutional law and evidence. Disclaimers (if indeed this is such) are rarely of any evidentiary value in countering allegations of discrimination since such is so selfserving. Further, this

quote even misstates the degree of involvement of the discriminatory motive needed to trigger this constitutional burden shifting. *Arlington Heights, supra,* clearly states that the trial court is forbidden to use this presumption even in part of its decision making, not just as the sole basis as suggested by the opinion's quote.

The Court of Civil Appeals does not deny or dispute the statistics. It does not deny or dispute the historical role of the tender years doctrine. It is interesting to note that despite the extensive citation in Petitioner's brief to the Court of Civil Appeal to the constitutional cases of *Ex parte Devine, Reed, Frontiero, Orr* and *Caban, supra,* neither Respondent's answer brief nor the Court of Civil Appeal's opinion ever once mentions, discusses, analyzes or distinguishes any of these cases. The Alabama appellate court's total lack of sensitivity to constitutional violations previously demonstrated in *Orr v. Orr* continues. At the appellate level, as well as the trial level, silence is golden in perpetuating this discrimination.

But the absurdity of the use of this "statement" only grows as one looks closer at the "statement". The "statement" in the first place is not a statement but a question. The statement *within* the question, however, clearly expresses the trial court's opinion (presumption) that "the initial bond makes the mother the better parent". The trial court is asserting a general rule in asking the expert witness to confirm that there are exceptions to the judge's rule. This "rule" is based on Valerie Wheeler's attorney's questions concerning "an initial bond", the product of the "birthing process and carrying the unborn baby". Obviously any characteristic associated solely with the birthing process is an "immutable characteristic of sex" attributable only to the female. Therefore, the trial court's rule forever precludes fathers from custody except in unusual circumstances. Of course, that scenario is exactly consistent with the tender years doctrine when a father must meet the "difficult burden" of "clear and

convincing evidence of the mother's positive unfitness". *Ex parte Devine, supra,* at page 691. But if the father is just "*more* fit" than a "minimally fit" mother, he will be forever denied custody of his children! The trial court's general rule is certainly no disclaimer of sex bias. To the contrary, it is totally inconsistent with this Court's holding in *Caban,* as acknowledged in *Ex parte Devine,* that "maternal and paternal roles are not invariably different in importance".

Only a strict scrutiny of this record at the appellate level will remedy this violation. Even the Respondent has acknowledged, in her Brief below, that this is the appropriate remedy if discrimination is found. Unlike the remedy established in *Powers* when a constitutional violation is established, a new trial is not a remedy because that would only remand the case to the source of the discrimination, the Alabama judiciary.

In this case, it is respectfully submitted that the strict scrutiny test must be done by this Court. A remand to the Alabama appellate court would be a travesty. The Alabama courts have an historical insensitivity to constitutional issues. See *Orr v. Orr.* These courts certainly have shown no sensitivity to this case. Further, it is obvious these courts have no experience or any desire to have any experience with the concept of strict scrutiny. A fair review by this Court would assist the Alabama Courts in applying strict scrutiny in the future.

This is consistent with the Court's fact-finding efforts in prior constitutional cases. Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction § 4033 summarizes, in relevant part, as follows:

> And so the Court has now asserted its power to make an independent examination of the entire state record in order to protect constitutional rights in a wide variety of cases, at the same time expressing various standards of deference that would be equally appropriate as applied to

> lower federal courts. And as with respect to federal courts, deference may disappear if the findings are adopted without thought from suggestions of counsel, or *the factfinding tribunal was itself tainted.*
>
> Findings of historical fact also are subject to review. A classic example is provided by *Norris v. State of Alabama* . . . This undertaking was fully justified by its statement that its responsibility to safeguard constitutional rights includes the duty to examine the evidence to determine whether federal rights have been denied "in substance and effect," as well as expressly. (emphasis added)

This is clearly required in the case at bar where the *de facto* application of the tender years doctrine has denied the Petitioner his equal protection of the law "in substance and effect" by the tainted courts below.

The difficulty with this case is not the specific resolution of the issue between these parties. The Petitioner will prevail with a strict scrutiny review. Instead the difficulty is the formulation of the remedy to be laid down for future cases in Alabama to insure that a fair and full compliance with the equal protection clause occurs at the state level without continuing recourse to this Court. In the area of custody, Alabama is devoid of the "panoply of procedural protections" only recently approved by this Court in *Pacific Mutual Life Insurance Company v. Haslip*, 59 U.S.L.W. 4157 (1991) in sustaining Alabama's punitive damages law against constitutional attack.

CONCLUSION

The Petitioner, as a practicing trial attorney, understands the concerns and needs of this court to only address cases of great import. This is such a case in that the Alabama judiciary's refusal to enforce the promise of *Caban* injures not only the constitutional rights of Alabama fathers, but also the welfare of Alabama's children.

If the financial discrimination suffered by Alabama's husbands in *Orr v. Orr* is worthy of review by this Court, then is not the welfare of Alabama's children certainly also worthy of review?

Further, this Court has recently commented on the jury trial system in *Powers, supra,* as follows:

> The purpose of the jury system is to impress upon the criminal defendent and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. (59 U.S.L.W. at 4272).

By analogy, the issue of this case might be phrased:

> Is not the purpose of the divorce trial system to impress upon the parties and the community as a whole that a judgment of custody is given in accordance with the law by judges who are fair?

That inquiry must be answered in the affirmative. When the community and the parties all know that a father in Alabama is being systematically denied an opportunity for custody of his children then both the purpose and the integrity of the divorce trial system is totally compromised and no one can ever accept such a judgment as being fair.

Let there be no mistaking that this is a watershed case. It is analogous to the civil rights movement some 30 to 35 years ago. Then segregation, separate but equal, had been outlawed (*Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954)). But then, why were all the blacks still at the back of the bus? Today, why are all the fathers in Alabama still being made to stand "at the back of the bus" in custody cases?

Just as important, the children of the State of Alabama have been promised that their custodial parent would now be selected in accord with their "best interests". They are entitled to the best *parent*. But *Ex parte Devine* has been a false promise.

A child intuitively understands this Court's holding in *Caban*. To the child, the maternal and paternal roles are not invariably different. The child does not distinguish between mother and father. He only knows who is there for him in the middle of the night, who is there to tell him stories and thus teach him, who is there to play with him and reassure and nurture him, who is there to care for him every evening and every weekend. These things the father did in this case, and yet his children are now hundreds of miles from him at the whim of the mother.

The Petitioner is a father of the children of tender years in the State of Alabama. As such he is a member of a constitutionally protected "suspect classification". Without the intercession of this Court he, and the other fathers in Alabama, will have no remedy or recourse to the continued *de facto* application of the tender years doctrine. Upon the grant of certiorari by the Court, a strict scrutiny of the record by the Court, in light of the sixteen factors enumerated in *Ex parte Devine*, will show the father as the proper party for the custody of his children.

Respectfully submitted,

WILBURN DONALD BOLTON, JR.
Post Office Box 259
307 South McKenzie Street
Foley, AL 26535
(205) 943-3860
Attorney for Petitioner

Thomas E. WHEELER, Jr.

v.

Valerie R. WHEELER.

Civ. 7482-X.

Court of Civil Appeals of Alabama.

Sept. 12, 1990.

Rehearing Denied Oct. 24, 1990.

Certiorari Denied Jan. 25, 1991
Alabama Supreme Court 1900201.

Herndon Inge III, Mobile, for appellant.

David A. Simon of Wills & Simon, Bay Minette, for appellee.

RUSSELL, Judge.

This is an appeal from a divorce decree which awarded custody of the parties' three minor children to the mother.

Thomas E. Wheeler, Jr. (father), and Valerie R. Wheeler (mother) were married on October 22, 1983. Three children were born to the marriage. Following an ore tenus hearing, the parties were divorced by order of the court dated December 12, 1989. Custody of the three minor children was awarded to the mother.

The father appeals. The mother cross-appeals. We affirm.

As regards the mother's cross-appeal, we note that she raises no contentions of error by the trial court. Therefore, her appeal is dismissed.

The father contends that the evidence demonstrated that the best interests of the children would be served by awarding him custody and that the trial court's refusal to do so was the result of its de facto application of the now abolished tender years doctrine.

Initially, we note that, when testimony is presented ore tenus, there is a strong presumption that the trial court's ruling with regard to child custody is correct. *Turquitt v. Turquitt*, 506 So.2d 1014 (Ala.Civ.App.1987). Because the trial judge is in a unique position to observe and to hear the evidence, this court will not reverse on appeal unless the ruling is so unsupported by the evidence that it constitutes an abuse of discretion and, therefore, is clearly and palpably wrong. *Flowers v. Flowers*, 479 So.2d 1257 (Ala.Civ.App.1985).

Furthermore, the controlling consideration in the award of custody is the welfare and best interests of the children. *Shepherd v. Shepherd*, 531 So.2d 668 (Ala.Civ. App.1988). In making such a determination, the trial court may take into consideration a number of factors, including the age and sex of the children, as well as each parent's ability to provide for the children's educational, emotional, material, moral, and social needs. *Santmier v. Santmier*, 494 So.2d 95 (Ala.Civ.App.1986).

In light of the vast case law addressing the issue of child custody, we pretermit a detailed recitation of the facts. Suffice it to say that, after carefully reviewing the record, we find that there is ample evidence that both parties are fit persons to be awarded custody. We have stated heretofore that in such a case, "the trial court would not have been in error regardless of whom was

awarded custody of the child[ren]." *Hood v. Wilson* 496 So.2d 76, 77 (Ala.Civ.App.1986).

Both parents are loving and nurturing and appear well suited to provide for the material and emotional needs of their children. Furthermore, there was testimony that the father actively participated in the daily care of the children. However, there was also before the court, albeit contradicted, testimony that the mother had primary responsibility for the daily care of the children during the parties' marriage, as well as subsequent to their separation.

Because the evidence conflicted, it is well within the prerogative of the trial court to determine what custody arrangement was in the best interests of the minor children. *Myers v. Myers*, 523 So.2d 413 (Ala.Civ.App.1987).

Finally, regarding the husband's contention that the trial court reached its decision based on improper concerns, expressly the tender years doctrine, we note that, while questioning an expert witness, the trial court stated, "Simply because that initial bonding exists does not necessarily in all cases make the mother the better parent, does it?" We find this statement to be indicative of the trial court's recognition that an award of custody based solely on the tender years of the children is improper.

Therefore, there was evidence to support the grant of custody to the mother, and we cannot say that the trial court was palpably wrong in doing so. This case is due to be affirmed.

The mother's request for an attorney's fee is hereby granted in the amount of $650.

CROSS-APPEAL DISMISSED; AFFIRMED.

INGRAM, P.J., and ROBERTSON J., concur.

Law and Human Behavior, Vol. 14, No. 2, 1990

Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine*

Laura E. Santillit and Michael C. Robertst

This study investigated the impact of the abolition of the tender years doctrine on custody decisions in divorce cases. This doctrine supported the presumption that the mother is the more suitable parent for young children. In March of 1981, the Supreme Court of the State of Alabama found this doctrine to be unconstitutional. To assess the hypothesis that this ruling had a significant effect on custody-related decisions, a sample of court records for divorce cases in an Alabama county was examined as representative of the state on a number of key variables. Overall, no significant differences were found on indicator variables for the comparisons before and after the ruling. There was neither an increase in custody grants to fathers nor an increase in custody requests by fathers.

The impact of parental divorce on children has been extensively researched, and it has been well documented

---

* This paper is based on the thesis submitted by the first author, under the supervision of the second author, in partial fulfillment of the master's degree at the University of Alabama. The authors wish to thank Robert D. Lyman, Steven Prentice-Dunn, Mariella Maieron, and Doris Turner for their assistance during various phases of the project. Address reprint requests to Michael C. Roberts, Department of Psychology, Box 870348, The University of Alabama, Tuscaloosa, AL 35487-0348.

† The University of Alabama.

that these children are at risk for mental health problems (e.g., Hetherington, Cox, & Cox, 1982; Wallerstein & Kelly, 1980). Lyman and Roberts (1985) called for efforts to minimize the impact of the divorce process on children, including careful consideration of custody decisions. Consequently, examination of the type of custody arrangements currently being granted in the court system is of crucial importance.

Hetherington and Martin (1986) predicted that 40% of the children in the United States will be exposed to a parental divorce before they reach the age of majority. Trends in custody decisions have evolved through the ages of human history. Until the beginning of the twentieth century, paternal custody enjoyed a clear preference (Derdeyn, 1978; Marafiote, 1985). By 1978 it was estimated that 80% of all contested custody decisions were awarded to the mother and that maternal custody characterizes the situation for about 90% of the children (Hetherington & Martin, 1986). This shift to maternal from paternal custody has been attributed to a separation of the issue of custody from the ideas of property and ownership, an increase in the status of women, and an increased interest in the development and rights of children (Marafiote, 1985). More specifically, public education, child labor laws, and children's aid societies contributed to changed views about children. The *tender years* and *best interests of the child* doctrines have been considered the two primary means by which these changed views impacted on custody decisions (Derdeyn, 1978).

In short, the tender years doctrine was derived from the presumption, which emerged in the nineteenth century, that the mother was the parent ideally and inherently suited to care for children of a "tender age" (McCahey, Kaufman, Kraut, Gaffner, Silverman, & Zett, 1986). The presumption would be proceeded upon unless the mother was proven to be unfit. The age of the children then began to be cited more frequently in decisions and the phrase *tender years* was often used by courts, though rarely well defined (Little, 1982).

During the last two decades, the tender years doctrine has been abolished or abandoned in a growing number of states, both through landmark court decisions and state statutes. Radcliff (1977) succinctly outlined three major areas of challenges to the tender years doctrine: (a) as a violation of the equal protection in procedure granted under the Fourteenth Amendment, (b) as a violation of equal rights amendments of many state constitutions, and (c) as a psychologically questionable doctrine. The first two challenges point to the doctrine's invalidity as a legal presumption. The last of these three challenges highlights the possible invalidity for the factual basis of the presumption in the tender years doctrine. In 1977, the Council of Representatives of the American Psychological Association stated that the presumption against fathers in child custody cases did not have a scientific or psychological basis (Levy, 1985). Many questions remain unanswered, but the research has demonstrated the importance of the father's role (Berry, 1981).

The best interests of the child standard has now become the overwhelming criterion in custody decisions. However, the implications of this phrase are rather broad

and have generally been vaguely defined (Marafiote, 1985). Weiner, Simons, and Cavanaugh (1985) contend that this standard should call for consideration of factors including the child's relationship with each parent, the adjustment of the child and each parent, and the preferences of the child and the parents. Thus, the tender years doctrine could stand, in spite of the cited legal issues, if it served the best interest of the child.

In Alabama, the 1981 case of *Devine v. Devine* was a ruling at the state supreme court level that challenged the tender years doctrine (Lyman & Roberts, 1985). In his decision, Justice Maddox pointed to rulings by the United States Supreme Court that gender-based classifications were in violation of the Fourteenth Amendment and stated the Alabama court's conclusion that the tender years presumption resulted in such a classification. Furthermore, he commented on the lack of evidence supporting the claim that the tender years doctrine serves the best interests of the child. The *Devine* case serves as a marker of change affecting family courts in Alabama and its numerous divorce and custody cases per year. However, it is unclear if this state supreme court ruling has had an effect on cases handled by judges at the lower levels.

There are a variety of ways in which the impact of court rulings or new laws may be analyzed. In the legal approach, the qualitative descriptions of selected cases, quite often Supreme Court rulings, are considered in a logico-deductive analysis. Case precedents are analyzed for "how legal rules play out in particular fact situations" (Hegland, 1983, p. 16). For example, Gardner (1987) "assessed the reasons for and implications of the recent

movement towards punitive juvenile justice" (p. 151) by reviewing state statutes and case law.

In a more process-oriented exposition, or what Melton (1986) called more sociological than legal case studies, Mnookin's (1985) authors focused on five Supreme Court rulings (e.g., adolescent abortion, child support enforcement) as case studies for evidence of test-case litigation. As another approach to assessing impact, surveys are sometimes conducted of those affected by a statute or ruling. For example, Lowery (1981) surveyed state circuit court judges to ascertain the importance of factors used in child custody decisions (e.g., age of the child, keeping child with mother). Melton (1981) surveyed community mental health centers to find that 40% were unaware of a state law permitting minors to consent to psychotherapy. Similarly, wise (1978) surveyed mental health professionals to assess the impact of the "duty to warn" in the *Tarasoff* decision. Only rarely have actual court case outcomes been evaluated. For example, Gardner (1987) did not collect outcome data of decisions by juvenile courts, and in the Mnookin (1985) analyses, data were not reported on actual case outcome at the "front lines" of law in the lower level courts. As one example of impact analysis by using court actions, Ilfeld, Ilfeld, and Alexander (1982) analyzed consecutive custody cases in Los Angeles and found that relitigation rates were not greater after California's state law giving preference to joint custody.

To test the hypothesis that abolishment of a doctrine that presumed the mother to be the superior parent for young children has had significant impact on custody decisions, it is necessary to examine the type of decisions

made since the abolition and compare them to those made while the doctrine was still in effect. The *Devine* case in March of 1981 serves as a marker in Alabama and was used to explore the impact of such decisions. It was proposed that cases from the 5 years prior to the *Devine* decision and the 5 years subsequent be examined on a number of pertinent variables.

The present study is an empirical data analysis of specific outcome measures to ascertain the impact of legal precedent. Trends emerging prior to the *Devine* decision were considered, and hypothesized differences were predicted to be greater than those that would result merely from a continuation of such trends (e.g., the number of sole custody awards to fathers was expected to be ever-increasing throughout the 10-year period, but increase at a greater rate after 1981).

The underlying notion in the following study was that the *Devine* decision had an impact on all major custody variables relating to the role of the father. Such an impact, if present, would result from the fact that, after the *Devine* decision, each party had an equal chance of winning an award and the burden of proof would no longer have been on the father to prove the mother to be unfit. Therefore, the only presumption would be that both parental roles were equally important.

Based on this underlying notion, it was hypothesized that, if the *Devine* ruling had an impact on family court decisions, it would be reflected in the following outcomes, as compared to the period prior to the decision:

1. There would be a greater number of custody awards to fathers.

2. There would be a greater number of custody requests by fathers.
3. There would be a greater number of contested cases.
4. There would be a greater amount of specific visitation time for noncustodial fathers.

Additional outcome variables would similarly reflect an impact of the decision including (a) numbers of joint custody awards, (b) numbers of qualifications to awards for sole-to-mother custody, (c) calling of witnesses for court proceedings, (d) child support payments by mothers, and (e) age of children as a determining factor.

METHOD

Data Base

Court records of divorce cases filed from 1976 through 1980 and 1982 through 1986 in Tuscaloosa County, Alabama, constituted the data base from which the study data were obtained. Cases were classified by the month and year in which they were initially filed, with every other month being sampled (viz., January, March, May, July, September, and November). Records were sampled for a given month and examined to ascertain whether they met the initial criterion of involving a couple with at least one minor child.

Those that met this criterion were examined to determine whether the record contained a final decree that was dated before or after the *Devine* decision. Those that were filed and decided before March of 1981 were considered to be before the *Devine* decision. Those that were

filed and decided after December of 1981 were considered to be after the *Devine* decision. Those not falling in either of these categories were not included in the study. This procedure was done to eliminate any case within a time frame where the impact of the *Devine* decision might be ambiguous.

Sampled cases were included until five in a given month met the criteria and sampling recommenced at the beginning of the next appropriate month. This procedure resulted in a total sample of 300 cases, 30 in each of the 5 years before the *Devine* decision and 30 in each of the 5 years after the decision. Based on Tuscaloosa County data of the number of divorces granted per year and Alabama state data on the percentage of divorce cases that involve minor children, it was estimated that this number of cases represented a 10%-20% sample of the defined population (Alabama Bureau of Vital Statistics, 1983-1986, inclusive).

Tuscaloosa County comprised the population from which the sample was drawn. This county is comparable to the state of Alabama as a whole along many potentially relevant dimensions (U.S. Department of Commerce & Bureau of the Census, 1982). These dimensions include per capita income, percent of the population who have ever been divorced, ratio of blacks to whites, and percent of the population living in urban area.

Procedure

Each divorce record to be included was reviewed and the relevant information recorded based on operational definitions for each of the variables. Categories were

developed as the data were gathered. When any adjustments were made in categories as the study progressed, all earlier records were recoded appropriately. Whether or not custody was contested was a crucial variable and contested cases were examined separately, as well as included in the complete data base. The other variables included (a) number of children, (b) sexes and ages of the children, (c) length of the marriage, (d) which party was the initial filer for divorce, (e) presence or absence of a counterclaim, (f) which party was the petitioner for custody initially, (g) whether a visitation request was made, (h) which party petitioned for visitation, (i) existence of a visitation contest, (j) grounds for the divorce decree, (k) sex of each lawyer and of the judge, (l) types of custody and visitation requested and contested for and granted, (m) inclusion of a request for child support, (n) amount of support requested and granted, (o) arrangements for insurance, education, health care, and other expenses, (p) relocation provisions, (q) whether expert witnesses were called, (r) which party called the expert witnesses, (s) legal case precedents cited in decisions, (t) psychosocial needs noted or considered in custody decrees, and (u) other actions included and any additional information.

These court files are public records and, therefore, are available for scrutiny. However, because they do contain sensitive information that the individuals involved might prefer not to be widely circulated, the following precautions were taken. The data from each record were maintained on a sheet identified only by a subject number assigned by the investigator. A separate list of subject numbers matched with court case numbers was

kept secured. Furthermore, in reporting the data, no individual situation was identified and only composite information was included. These protection procedures were reviewed and approved by the University's Institutional Review Board. Access to the files was facilitated by the Circuit Clerk's office.

Design

A simple interrupted time series design was used to assess the impact of the *Devine* decision on father custody requests, contests, father custody grants, and noncustodial-father visitation. This approach allows for the consideration of trends over time before and after the decision (Cook & Campbell, 1979). Each month sampled was regarded as one observation point and a separate time series analysis was used for each variable. Thus, the *Devine* decision in March of 1981 was considered to be the interrupting "treatment."

Data Analysis

Frequencies, percentages, and means were computed for all of the variables, as appropriate. Descriptive information on the family situations, divorce-related actions, and arrangements affecting the children, as stated in the final divorce decrees, are provided below.

The Box-Jenkins Time series analysis (Liu, 1985) was conducted on frequency observations for three of the key variables to assess the appropriateness of an Autoregressive-Integrated Moving Average (ARIMA) model and to test for seasonality. ARIMA models essentially provide

means of examining systematic changes in time series while estimating error in an unbiased fashion. This approach allows for the assessment of seasonality – that is, any systematic fluctuations in these frequencies that may have been a function of the month in which the petition was filed (McCain & McCleary, 1979). Because of the extremely low frequencies of custody requests by fathers, contested custodies, and custody awards to fathers, the *C* statistic (Tryon, 1982) was used to evaluate the probability that the time series were random and, thus, test for any trends in the data. This assessment was made for the 30 sampling points prior to the *Devine* decision in 1981, as well as the time series as a whole for each of the three variables.

As a result of the number of cases where a quantitative estimate could not be made of visitation time, this variable could not be examined in time series. Because this variable was reasonably normally distributed, a *t* test was employed to compare the mean number of visitation days per year for noncustodial fathers before 1981 with that after. An *F* ratio was first computed to assess the equality of the variances.

Reliability

A randomly drawn sample of 5% of all files was coded independently on five key variables by a second investigator in order to establish the reliability of the primary coding. This second investigator was blind to any stated hypotheses of the study. This percent of sampling was deemed appropriate because of the minimal amount of coder discretion involved in this study for the

dependent variables. The five key variables for reliability coding included (a) the type of custody initially requested, (b) whether or not a contest to the initial custody request was filed, (c) the amount of child support ordered, (d) the visitation granted, and (e) the type of custody ordered in the final divorce decree. The reliability index was computed by dividing the number of agreements by the total number of coding decisions (agreements plus disagreements) and multiplying the quotient by 100. The overall agreement was 98.7%.

RESULTS

Demographics

The 300 families considered in the study accounted for a total of 510 minor children, including those of pregnancies in progress at the time the divorce petition was initially filed. Thus, there was an overall mean of 1.7 children per family, ranging from means per filing year of 1.5 to 2.0. Over half of the families (152) included only one child. The average age of the eldest child at the time of the initial petition was 7.6 years, while the average age of the youngest child was 4.6 years. These couples were married an average of 8.4 years, and the mean length of time between the filing of the initial petition and that of the final decree was 9.8 weeks. The court records included no useful socioeconomic indices, and information on employment was generally not available. Data on the division of marital assets could not be meaningfully coded.

Court Process

The mother was listed as plaintiff and, therefore, formally initiated the divorce process in 73.3% of the cases.[1] In 27 cases (9%), counterclaims to the initial petitions were filed, and of these, 70.4% included a contest to the custody arrangement requested in the initial petition.

In 296 cases, the identity of the judge could be determined. A total of nine judges heard these 296 cases, with two of these judges hearing 253 or 85.5% of them. Of the 296 cases, 295 were decided by male judges. In 82.5% of the 212 cases where it could be determined, the lawyer representing the mother was male and in 96.2% of the 106 cases where it could be determined, the lawyer representing the father was male.

Custody

Table 1 summarizes the relationship between the type of custody requested by the initial petitioner and the type of custody granted. The category "Mother" denotes a situation where sole custody for all the children in a family was granted to the mother and, similarly, "Father" denotes sole custody to the father. Included in the "Joint" category are situations described as joint legal custody and as joint legal and joint physical custody. Of the joint

---

[1] Summaries are available from the second author describing additional analysis including: predecree petitions, grounds for divorce manifested on final decree, type of visitation requested and granted, types of child support arrangements ordered, types of petitions filed after final divorce decree (relitigation), and type of custody granted by age of children.

custody requests, three were for joint legal custody and two were for joint legal and joint physical custody. Of the joint custody grants, five were for joint legal custody and two were for joint legal and joint physical custody. The "Split" category refers to those situations where the mother is granted the sole custody of one or more of the children and the father is granted the sole custody of another one or more of the children. The "Other" category includes requests for the court to decide and temporary-only custody grants.

Table 1. Type of Custody Requested – Type of Custody Granted[a]

Granted			Initially requested custody				
Custody to	*n*	%	Mother (*n* = 268)	Father (*n* = 15)	Joint (*n* = 5)	Split (*n* = 9)	Other (*n* = 3)
Mother	274	91.3	264*	6	1	1	2
Father	10	3.3	2	8*	0	0	0
Joint	7	2.3	1	1	4*	1	0
Split	8	2.7	1	0	0	7*	0
Other	1	0.3	0	0	0	0	1*

[a]Note: "*" Denotes situations where the custody granted matched the custody requested; overall 94.7% of initial requests were granted.

Sole custody was initially requested on behalf of the mother in 89.3% of the cases and of the father in 5% of the cases. In 1.7% of the cases, joint custody was requested, and in 3% of the cases some form of split custody was requested. The most common scenario of the mother requesting and being granted sole custody occurred in 88% of the cases. Overall, 94.7% of all initial requests were granted.

Reasons for custody requests or contests were examined in the cases where the father requested and/or was granted custody. In one of the eight cases requested by and granted to a father, the father stated that he felt he should be granted custody because the child was a male. In one of the cases where the father initially requested custody and later apparently changed his mind and in two of the cases where the mother contested the father's request and won the case, the father alleged that the mother was unfit. In one of the two cases where the father won a contested case, the father stated that it was the children's wish to live with him.

Table 2 includes only the contested cases (n = 19) depicting which parent initially requested sole custody and what outcome resulted. As can be seen, sole father custody was granted in none of the cases where the father initially requested custody and the mother contested this arrangement. In both cases where the father asked the court to decide, sole custody to the mother was granted. Of the contested cases, about half were granted as initially requested. It was in two of these contested cases where the only two citations of case precedents were found. One of the contests was before 1981 and the

Table 2. Type of Custody Requested – Type of Custody Granted in Contested Cases[a]

Granted			Initially requested custody				
Custody to	*n*	%	Mother (*n* = 12)	Father (*n* = 4)	Joint (*n* = 0)	Split (*n* = 1)	Other (*n* = 2)
Mother	14	73.7	9*	3	0	0	2
Father	2	10.5	2	0*	0	0	0
Joint	2	10.5	0	1	0*	1	0
Split	1	5.3	1	0	0	0*	0
Other	0	0.0	0	0	0	0	0*

[a]Note: "*" Denotes situations where the custody granted matched the custody initially requested; overall, 47.7% of initial requests in contested cases were granted.

father's lawyer cited cases where the best interests of the child standard predominated over the tender years doctrine. In the contest after 1981, the *Devine* case was cited by the father's lawyer.

Child-Related Content of Decree

The type of visitation arrangements requested and granted was also analyzed. Overall, the type of visitation requested exactly matched the type of visitation granted in 78% of the cases. In 264 of the granted situations, these arrangements described the visitation of the father. In 12 cases, arrangements were specified for mothers, and in three cases, visitation was referred to for both parents. Visitation was addressed in 93.7% of the cases. Of the granted visitations, 62.7% were described as reasonable, liberal, or unlimited, and not specified further. In cases where it was possible to estimate the days per year spent with the noncustodial parent, the mean visitation was 60.3 days per year, ranging from 0 to 142 days per year. Restrictions were ordered on visitation in 10.3% of all cases (including sobriety and limitation of setting or city).

The types of child support and other financial arrangements ordered were considered. In 93% of the cases, some reference to child support was made in the final decree. Fathers were ordered to pay the child support in 99.2% of these cases. Arrangements included heath insurance, medical, dental, and eye care costs, and educational costs. The mean amount of child support, when an amount was specified, averaged $134.14 per child per month across the 10-year period.

Relitigation

In 73 of the 300 cases (24.3%), a child-related, post-divorce petition was filed by at least one of the parties. In 17.3% of all the cases, the custodial parent filed at least one petition. In 9% of the cases, the noncustodial parent filed at least one petition. In 2.7% of the cases, at least one petition was brought jointly by both parties. The most frequent petitions were for a rule to show cause regarding nonpayment of child support, filed by custodial mothers. The court ordered modifications in child support in 7.7% of the total sample, in visitation in 4.7% of the total sample, and in custody in 2% of the total sample. The majority of support and visitation modifications entailed specifying arrangements that were left ambiguous in the final decree.

Impact of the *Devine* Decision

Table 3 provides the distribution of the types of custody requested and granted, summarized for each of the 5 years before the *Devine* decision and the 5 years after the decision.

Figure 1 depicts the comparison of percentages of sole mother custody grants with the percentage of all the other types of custody grants combined, before and after the *Devine* decision.

Table 3. Type of Custody Requested and Granted by Year of Filing[a]

Year initial divorce petition filed	Percentage of custody requested by					
	Mother (n = 268)	Father (n = 15)	Joint (n = 5)	Split (n = 9)	Other (n = 3)	Percent contested
1976 (n = 30)	90.0	3.3	0.0	3.3	3.3	10.0
	90.0	3.3	0.0	3.3	3.3	3.3
1977 (n = 30)	86.7	10.0	0.0	3.3	0.0	13.3
	86.7	6.7	0.0	6.7	0.0	0.0
1978 (n = 30)	86.7	6.7	0.0	6.7	0.0	3.3
	93.3	3.3	0.0	3.3	3.3	0.0
1979 (n = 30)	93.3	3.3	0.0	3.3	0.0	0.0
	93.3	3.3	0.0	3.3	0.0	0.0
1980 (n = 30)	96.7	0.0	0.0	0.0	3.3	3.3
	100	0.0	0.0	0.0	0.0	0.0
1981	Year of *Devine* decision					
1982 (n = 30)	86.7	6.7	0.0	6.7	0.0	6.7
	86.7	6.7	0.0	6.7	0.0	0.0
1983 (n = 30)	83.3	6.7	6.7	3.3	0.0	6.7
	86.7	3.3	6.7	3.3	0.0	0.0
1984 (n = 30)	93.3	0.0	3.3	0.0	3.3	13.3
	93.3	3.3	3.3	0.0	0.0	0.0

Year initial divorce petition filed	Percentage of custody requested by					
	Mother (n = 268)	Father (n = 15)	Joint (n = 5)	Split (n = 9)	Other (n = 3)	Percent contested
1985 (n = 30)	83.3	10.0	3.3	3.3	0.0	6.7
	90.0	3.3	6.7	0.0	0.0	0.0
1986 (n = 30)	93.3	3.3	3.3	0.0	0.0	0.0
	93.3	0.0	6.7	0.0	0.0	0.0

[a]Note: Top number in each entry indicates percentage of custody *requests* per party; bottom number indicates percentage of custody *granted* per party.

A Box-Jenkins Time Series analysis was conducted to assess the appropriateness of ARIMA models for the frequencies of (a) requested sole father custodies, (b) granted sole father custodies, and (c) contested custodies. The analyses indicated no seasonal component in any of the three series. All of the autocorrelations and partial autocorrelations were effectively zero with no systematic variations. Thus, custody requests, contests, and grants did not fluctuate in any predictable pattern according to the month in which the initial divorce petition was filed. Therefore, it was not necessary to seasonally adjust any of these time series (McCain & McCleary, 1979).

During the period from January 1976 through November 1980, there were no significant changes ($p > .05$) noted in the number of fathers requesting custody, the number of custody cases being contested, or the number of fathers being granted custody, $Z = 1.05$, $Z = 1.23$, and $Z = 0.23$. Thus, no trends were observed to have occurred prior to the *Devine* decision, and the postintervention series could be simply appended to the preintervention series, while maintaining statistical power (Tryon, 1982). Analysis of the entire time series again revealed no significant deviations from randomness, $Z = 0.13$, $Z = 1.15$, $Z = -0.51$.

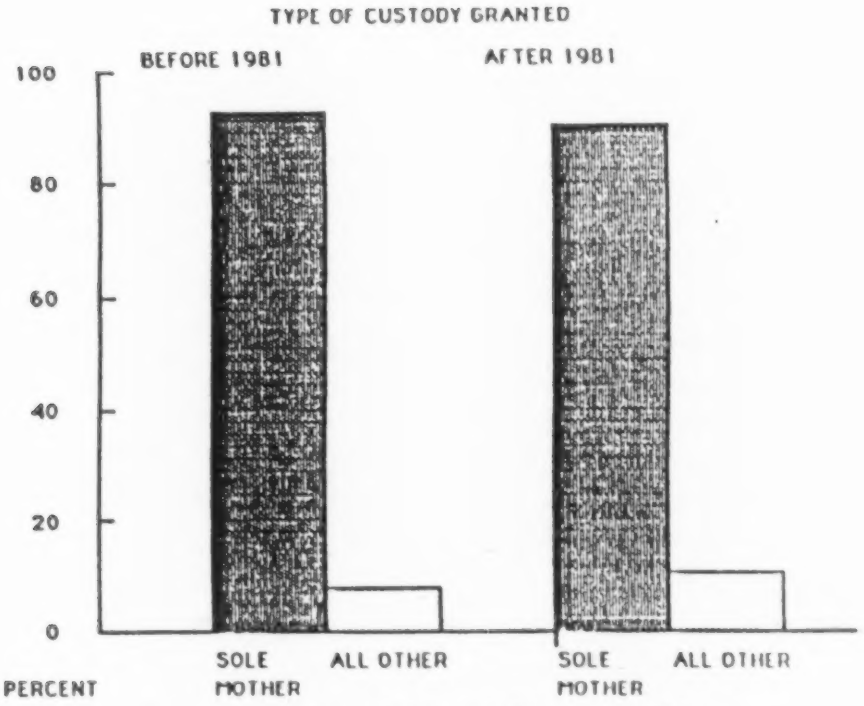

Fig. 1. Custody granted before and after *Devine* decision.

Therefore, no significant impact of the *Devine* decision could be discerned from this data.

Although in the expected direction, the difference between the mean days per year of visitation with non-custodial fathers before (M = 58.5, n = 36) and after (M = 63.4, n = 47) the *Devine* decision was not found to be significant ($p > .2$). Visual inspection suggested somewhat greater variations in visitation time before 1981, but this difference was also found to be statistically nonsignificant ($p > .4$). It should be noted that only the data from cases where visitation days were specified could be included in this analysis.

Of the other hypothesized differences, frequencies were too small to make meaningful statistical comparisons. All seven of the joint custody decisions were after 1981. It was, therefore, impossible to compare the amounts of child support in these situations. No qualifications at all were made to sole mother custody awards. Only two of the sampled cases contained references to evaluations by experts, one before the *Devine* decision and one after the decision. Both were ordered by the court and completed by psychologists. Only one mother was ordered to pay child support, and this followed the *Devine* decision. But, in one case prior to 1981, the issue of the mother paying child support was deferred until the mother became employed. Additionally, three references were made to a child's tender age. All were before 1981. In two was the statement that the decision of custody to mother was made "because of" the child's tender age, and in one was the statement that the decision of custody to the father was made "in spite" of the child's tender age.

DISCUSSION

This empirical analysis provides a means of assessing the impact of a precedent-setting decision by the State Supreme Court of Alabama. Overall, the results suggest that the impact of this decision, in which the tender years doctrine was ruled unconstitutional, was not significantly reflected in the custody orders following the decision through 1986. Not only did the number of fathers being granted sole custody remain relatively small and constant through the 10-year period sampled, but also the number of fathers requesting sole custody did not increase.

Although the utilization of joint legal and joint physical custody arrangements did occur only after 1981, this group of cases is also small and not sufficient to suggest a significantly expanded role for fathers. Perhaps most surprising is the finding that an increased recognition of the role of the father was not reflected in an increased amount of visitation with noncustodial fathers.

The number of cases where the custody decision was truly made by the court is too small to make the statement that the court itself has not changed. In this sample, an even greater number of custody arrangements than expected were agreed upon before the judge ever heard the case. In the majority of such cases, the court simply orders what the parties have agreed on, incorporating it into the final divorce decree. However, the court is not bound to rule in accordance with such agreements (McCurley & Davis, 1988). The finding that requests by fathers have not increased, however, lends itself to a stronger statement on the lack of change. Whether this is a result of fathers' or lawyers' perceptions of the court's thinking or a continuing lack of confidence or interest by fathers in primary parenting is open to debate. It may be argued that the impact of such a legal precedent will be evident only after a period of time that may be longer than it was possible to include in this study. Certainly, with few major relevant decisions made in family court annually in the state of Alabama, the lack of impact cannot likely be attributed to a delay in the transmission of information. However, further research, perhaps 5 years or longer from this study, may be able to determine what length of a time lag is associated with the translation of such information into court decisions, if any.

Apart from the apparent insignificance of the impact of the *Devine* decision in the current study, the results do not support the hypothesis that the key variables would reflect a gradually increasing role for fathers throughout the 10-year period. This had been predicted because it was assumed that the same ideological forces that were operating within the court system and led up to the *Devine* decision were operating in society at large. Owing to the relatively small sample size, we must be cautious in generalizing the results of this study to a similar situation in other states where the tender years doctrine has been abolished. However, Berry (1981) indicates that high mother custody rates continue in a number of states that have statutes eliminating the tender years doctrine. Perhaps the beliefs that females are more ideally suited to be parents or that the role of the mother is more essential to the adjustment of a child, except in extremely rare instances, have become so deeply ingrained in our society that court decisions or legislated statutes have not begun to make a significant impact on that belief system.

It is undoubtedly important to keep in mind that the decision in the *Devine* case provided that the gender of the parent may not be the primary consideration in custody decision; that is, it may not be presented as such. The presumption against fathers likely remains unexpressed in the minds of some lawyers and possibly judges. In the present study, there was some concern about ruling out the effect of the different judges hearing the cases. Of the two judges hearing the vast majority of the cases, one was in office primarily before the decision and one only after. Had an impact of the *Devine* decision been found, it would have been necessary to rule out this

history factor. However, the consistency in the rulings of all the judges adds further support to the lack of change, one that is broader than a single judge or even the court system.

Perhaps the unchanging patterns demonstrated in this study reflect most the socialization processes of the adults considered in the study. Individuals of a parenting age, such as the parties seeking divorces in the sampled cases, were likely exposed to traditional ideas of the mother as the more nurturing parent (Chilman, 1983). Perhaps, the gradual breakdown of sex role stereotypes will be more reflected in the parenting decisions by the next generation of parents. If divorce must be a reality for a number of these parents, then custody arrangements may also reflect this changing perspective.

In discussing custody arrangements, it is paramount to keep in mind that the parents' legal rights are, at least theoretically, always secondary to what is best for the child (McCurley & Davis, 1988). In the past it has appeared that the psychological community has not adequately disseminated the research findings that suggest the potential fitness of fathers as single parents (Bradbrook, 1971). Specifically, the mental health professional's potential role in custody cases, as described by Lyman and Roberts (1985), might expand when the court can no longer rely on presumption such as the tender years doctrine. However, this was not evidenced in this study.

The sort of methodology employed in the current study may be applicable for analyzing the impact of other state or federal supreme court rulings or statutes in a

variety of areas. In general, examples of simply citing rulings as a means of showing change following a legal act abound in legal research, without regard for quantification (e.g., for child custody: Bodenheimer, 1977). Examination of actual court decisions may reveal impact or no effect of significant rulings or laws. The research methodology and skills of the social sciences, thus, may be of some assistance in the legal analysis.

These results suggest the importance of keeping comprehensive statistics on key custody variables. In the state of Alabama, as in many states, the only child-related data collected on divorces include the number of children ever born to the marriage and the number of minor children at the time of the divorce (Alabama Bureau of Vital Statistics, 1983-1986). Additionally, if judges were required to justify their rulings and inclusion of these justifications in the court files was mandatory, data could be extracted more completely. Only with comprehensive empirical data will it be possible to know what is occurring and to assess whether underlying presumptions may be operating (Phear, Beck, Hauser, Clark, & Whitney, 1984). Emery, Hetherington, and DiLalla (1984) have asserted that "it seems reasonable to have courts provide the public with information on the yearly group statistics on custody decisions as a means of informing the public and protecting against systematic bias in the exercises of judicial discretion" (p. 255).

REFERENCES

Alabama Bureau of Vital Statistics (1983-1986, inclusive). *Vital views: Alabama quarterly statistical data*. Montgomery, AL: Alabama Department of Public Health.

Berry, K. K. (1981). The male single parent. In I. R. Stuart & L. E. Abt (Eds.), *Children of separation and divorce* (pp. 34-52). Atlanta: Van Nostrand Reinhold Co.

Bodenheimer, B. M. (1977). Progress under the uniform child custody jurisdiction act and remaining problems: Punitive decrees, joint custody, and excessive modifications. *California Law Review, 65*, 978-1014.

Bradbrook, A. (1971). The relevance of psychological and psychiatric studies to the future development of laws governing the settlement of inter-parental child custody disputes. *Journal of Family Law, II*, 557-587.

Chilman, C. S. (1983). Prologue: The 1970's and American families (A comitragedy). In E. D. Macklin & R. H. Rubin (Eds.), *Contemporary families and alternative lifestyles* (pp. 15-24). Beverly Hills, CA: Sage.

Cook, T. D., & Campbell, D. T. (1979). *Quasi-experimental: Design and analysis issues for field settings*. Chicago: Rand McNally.

Derdeyn, A. P. (1978). Child custody: A reflection of cultural change. *Journal of Clinical Child Psychology, 7*, 169-173.

Devine v. Devine, 398 So. 2d. 686 (1981).

Emery, R. E., Hetherington, E. M., & DiLalla, L. F. (1984). Divorce, children, and social policy. In H. W. Stevenson & A. E. Siegel (Eds.), *Child development research and social policy* (pp. 189-266). Chicago: University of Chicago Press.

Gardner, M. R. (1987). Punitive juvenile justice: Some observations on a recent trend. *International Journal of Law and Psychiatry, 10*, 129-151.

Hegland, K. (1983). *Introduction to the study and practice of law*. St. Paul: West.

Hetherington, E. M., Cox, M., & Cox, C. R. (1982). Effects of divorce on parents and children. In M. Lamb (Ed.), *Nontraditional families* (pp. 223-288). Hillsdale, NJ: Erlbaum.

Hetherington, E. M., & Martin, B. (1986). Family factors and psychopathology in children. In H. Quay & J. Werry (Eds.), *Psychopathological disorders of childhood* (3rd ed.) (pp. 332-390). New York: Wiley.

Ilfeld, F. W., Ilfeld, H. Z., & Alexander, J. R. (1982). Does joint custody work? A first look at outcome data of relitigation. *American Journal of Psychiatry, 139,* 62-66.

Little, M. (1982). *Family breakup.* San Francisco: Jossey-Bass Publishers.

Liu, L. (1985). Box-Jenkins time series analysis. In W. J. Dixon (Ed.), *BMDP statistical software* (pp. 639-660). Berkely, CA: University of California Press.

Lowery, C. R. (1981). Child custody decisions in divorce proceedings: A survey of judges. *Professional Psychology, 12,* 492-498.

Lyman, R. D., & Roberts, M. C. (1985). Mental health testimony in child custody litigation. *Law and Psychology Review, 9,* 15-34.

Marafiote, R. A. (1985). *The custody of children – A behavioral assessment model.* New York: Plenum Press.

McCahey, J. P., Kaufman, M., Kraut, C., Gaffner, D., Silverman, M., & Zett, J. (1986). *Child custody and visitation law* (Vol. 2). New York: Matthew Bender.

McCain, L. J., & McCleary, R. (1979). The statistical analysis of a simple interrupted time-series quasi-experiment. In T. D. Cook & D. T. Campbell (Eds.), *Quasi-experimentation: Design and analysis issues for field settings* (pp. 233-293). Chicago: Rand McNally.

McCurley, R. L., & Davis, P. A. (1988). *Alabama divorce, alimony, & child custody* (2nd ed.). Norcross, GA: The Harrison Co.

Melton, G. B. (1981). Effects of a state law permitting minors to consent to psychotherapy. *Professional Psychology, 12,* 647-654.

Melton, G. B. (1986). Litigation *In the Interest of Children:* Does anybody win? *Law and Human Behavior, 10,* 337-353.

Mnookin, R. H. (Ed.). (1985). *In the interest of children: Advocacy, law reform, and public policy.* New York: Freeman.

Phear, W. P., Beck, J. C., Hauser, B. B., Clark, S. C., & Whitney, R. A. (1984). An empirical study of custody agreements: Joint versus sole legal custody. In J. Folberg (Ed.), *Joint custody and shared parenting* (pp. 142-156). Washington DC: Bureau of National Affairs, Inc.

Radcliff, D. H. (1977). Pennsylvania child custody: The tender years doctrine. *Dickenson Law Review, 81,* 775-792.

Tryon, W. W. (1982). A simplified time-series analysis for evaluating treatment interventions. *Journal of Applied Behavior Analysis, 15,* 423-429.

U.S. Department of Commerce & Bureau of the Census (1982). *1980 Census of the Population* (Part 2 Alabama, Chapters A and B). Washington, DC: Bureau of the Census.

Wallerstein, J. S., & Kelly, J. B. (1980). *Surviving the breakup: How children and parents cope with divorce.* New York: Basic Books.

Weiner, B. A., Simons, V. A., & Cavanaugh, J. L., Jr. (1985). The child custody dispute. In D. H. Schetky & E. P. Benedek (Eds.), *Emerging issues in child psychiatry and the law* (pp. 59-75). New York: Brunner/Mazel.

Wise, T. P. (1978). Where the peril begins: A survey of psychotherapists to determine the effects of Tarasoff. *Stanford Law Review, 31,* 165-190.